

In The Matter Of:

*AMERICAN ZURICH INSURANCE COMPANY, ET AL v.
J. CRISMAN PALMER, ET AL*

*WITNESS: MIKE ABOUREZK
September 1, 2022*

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<p>1 Q Starting on page 10 through page 13 of 2 Exhibit 58 -- and I'm using the page numbers at 3 the top from the court filing -- 4 A Right. 5 Q -- are a series of proposed additional affirmative 6 defenses; is that correct? 7 A I think starting at page 9. 8 Q 9 on the bottom pagination, right? 9 A Oh, you're right. You're right. Page 10 has the 10 filing stamp. 11 Q Too many numbers. 12 A Yeah. 13 Q When you saw the request to add the first 14 affirmative defense, failure to exhaust 15 administrative remedies, did that create 16 concerns -- any concern for you in prosecuting the 17 plaintiff's case in this matter? 18 A No. There had already been rulings and I knew 19 that the most conservative -- or I should say the 20 ruling that was closest to the boundary I could 21 clear pretty easy, so there wasn't any concern 22 over that defense. 23 Q How about the second affirmative defense, failure 24 to submit to primary jurisdiction? Did that 25 proposed additional affirmative defense create any</p>	<p>1 that's the work comp title. And the Department of 2 Labor doesn't have any -- doesn't even have 3 jurisdiction to deal with non-work comp matters 4 like bad faith damages. 5 Q How do the bad faith damages compare to the 6 damages -- or remedies that are available under 7 the work comp statutes? 8 A How do they compare? 9 Q Yeah. I mean, you indicated that, you know, the 10 settlement was the work comp side. And that isn't 11 the bad faith damages that you were seeking. How 12 are they different? 13 A Work comp has a schedule of benefits. Has a 14 schedule of payments. It requires payment of 15 medical expenses. It requires payment of 16 temporary total disability and payment of 17 permanent total disability or permanent partial 18 disability. Those -- those are specific work comp 19 benefits. And there are some other benefits, 20 retraining, and so on. 21 But applicable to this case, the central 22 focus was that they -- they refused to pay any 23 further medical expenses, and so he stopped 24 getting treatment for pain. He was getting 25 epidural steroid blocks and treatment for pain.</p>
<p>1 concerns for you in prosecuting this case? 2 A No. The case had already been submitted to the 3 Department of Labor. 4 Q How about the third affirmative defense, 5 res judicata? Did that proposed defense create 6 any concerns for you in prosecuting the case? 7 A No. 8 Q Why not? 9 A Well, the settlement agreement said that he was 10 entitled to benefits, not that he wasn't entitled 11 to them. It said that they would accept 12 liability -- I'm trying to remember the wording, 13 and I don't remember the exhibit number here, but 14 the settlement agreement supported that Zurich was 15 responsible, had accepted liability for medical 16 expenses. 17 Q Item number four -- or the fourth affirmative 18 defense, release, did seeing that additional 19 proposed affirmative defense create any concerns 20 from you in prosecuting the case? 21 A No, because he hadn't released any of the damages 22 sought in the bad faith complaint. This was a 23 work comp settlement. And it says right in the 24 first part of the document that it is pursuant to 25 Title 62. And I forgot the statute number. But</p>	<p>1 And by denying that, he went three or four years, 2 it seems like, without being able to get 3 treatment. 4 Q Is pain and suffering a recoverable element of 5 damage under South Dakota law in worker's 6 compensation proceedings? 7 A Right, it is, along with emotional distress. And 8 neither one of those are part of the work comp 9 compensation scheme. 10 Q I'm going to reask the question because I think we 11 miscommunicated. 12 A Okay. 13 Q Under the work comp scale can you recover 14 emotional distress or pain and suffering? 15 A No. 16 Q Can you recover those as elements of damage in a 17 bad faith case in South Dakota? 18 A Yes. 19 Q And were you seeking those damages here? 20 A Yes. 21 Q The Exhibit 58, item number five, the fifth 22 affirmative defense, statute of limitations, 23 did -- when you saw that Zurich was seeking to add 24 that affirmative defense, did that create any 25 concerns for you in prosecuting this action?</p>

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<p>1 A No.</p> <p>2 Q Do you know what the -- at least the District of 3 South Dakota has ruled is the applicable statute 4 of limitations for bad faith in South Dakota?</p> <p>5 A Yes, I do.</p> <p>6 Q What is it?</p> <p>7 A Six years.</p> <p>8 Q Do you recall ever being concerned that you had 9 any statute of limitations in this case?</p> <p>10 A No, I don't recall having any concern about that.</p> <p>11 Q The sixth affirmative defense, failure to 12 mitigate, did that additional potential 13 affirmative defense create any concern for you in 14 prosecuting the case?</p> <p>15 A I thought it was a joke. It's just boilerplate. Boilerplate and garbage.</p> <p>17 Q How about number seven, superseding cause? When 18 you saw that did that create any concerns for you 19 in prosecuting your claims against Zurich?</p> <p>20 A No. This is -- that's just going through the list 21 of affirmative defenses and claiming every one of 22 them, regardless of whether there is any scintilla 23 of merit to it.</p> <p>24 Q Based upon your work in this file, were you aware 25 of any affirmative defenses that you were</p>	<p>1 being defendants. So it's not a big deal. (Whereupon, Exhibit 59 was then marked.)</p> <p>3 Q (BY MR. SUTTON) Mike, you've been handed Exhibit 59 4 which is Zurich's Rule 12(c),(h)(2)(b) Motion to 5 Dismiss.</p> <p>6 MR. SUTTON: Habits die hard. I'm trying to 7 make your life easier. Maybe it's worse. Sorry. 8 If I started talking to my wife that way, someone 9 can slap me. That you can put on the record.</p> <p>10 Q (BY MR. SUTTON) Did you receive this Motion to 11 Dismiss that was filed on behalf of?</p> <p>12 A Yes.</p> <p>13 Q And what is the date of this filing?</p> <p>14 A September 7, 2018. (Whereupon, Exhibit 60 was then marked.)</p> <p>16 Q (BY MR. SUTTON) Mike, have you -- do you have in 17 front of you Exhibit 60?</p> <p>18 A Yes.</p> <p>19 Q And is this Zurich's brief in support of the 20 motion to dismiss that was Exhibit 59 that we 21 looked at?</p> <p>22 A Yes.</p> <p>23 Q And then will you look at Exhibit 14?</p> <p>24 A Okay. I got it.</p> <p>25 Q Is Exhibit 14 your response in opposition to the</p>
<p>concerned would be asserted against you?</p> <p>2 A No.</p> <p>3 Q So I assume your answer for number eight, setoff, 4 would be the same, that didn't concern you when 5 you saw it?</p> <p>6 A Well, no. If there was -- if they were entitled 7 to any setoff -- and I'm -- I'm not recalling that 8 they were, but if they were entitled to one, I 9 don't care if they get it.</p> <p>10 Q And then the improper party, looking at 11 paragraph 9 of the affirmative defense, it 12 indicates plaintiff's cause of action is barred 13 against Zurich North America because it's merely a 14 trade style used by ZAIC, and it continues. Is 15 that the same issue that you exchanged 16 correspondence with Cris Palmer about early in the 17 case?</p> <p>18 A Yes.</p> <p>19 Q And you told him why you disagreed with him 20 legally, correct?</p> <p>21 A Yeah, I told him why I disagreed with it. But 22 even if -- even if you assume that there was merit 23 to this, all that means is one of these corporate 24 entities isn't going to be a defendant. That 25 doesn't relieve the other corporate entities from</p>	<p>Motion to Amend and the Motion to Dismiss?</p> <p>2 A Yes, it is.</p> <p>3 MR. SUTTON: Let's go off the record for a 4 second. (Off the record.)</p> <p>6 Q (BY MR. SUTTON) Will you please turn to Exhibit 12, 7 Mike?</p> <p>8 A Okay.</p> <p>9 Q And does Exhibit 12 -- is that the reply brief 10 that you received from Zurich in support of both 11 its motion -- in support of both its Motion to 12 Amend the Answer as well as a Motion to Dismiss?</p> <p>13 A Yes.</p> <p>14 Q Will you please turn to GPNA 719 on Exhibit 12?</p> <p>15 A Yes. I'm there.</p> <p>16 MR. HOYT: What page is that?</p> <p>17 MR. SUTTON: That's page 11 of the brief.</p> <p>18 Q (BY MR. SUTTON) What did you understand the 19 argument being made by Zurich to support dismissal 20 of your bad faith case?</p> <p>21 A That he -- that he, Joe Leichtnam, never obtained 22 a final decision from the Department -- 23 South Dakota Department of Labor establishing that 24 he was denied worker's compensation benefits to which he was entitled. It says it here</p>